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DISCUSSION RESPONSE

Quo Vadis PMSC?

The way forward in dealing with Private Military and Security Companies: A response to Prof. Sossai's assessment of the legal side effects of privatized war

FRAUKE RENZ — 4 December, 2017



In his recent post, Mirko Sossai succinctly summarized three phases of research on Private Military and Security Companies (PMSC). He also named the challenges on the way forward, particularly the need to avoid competing regulatory initiatives and finding an end to impunity of PMSC. This blog post will continue the discussion and focus on five key challenges for legal scholarship focused on PMSC.

1) Misunderstandings of Legal Terminology

As Sossai highlighted, the legal debate has shifted away from discussions about PMSC as mercenaries of the 21st century. There are however still a great number of experts that rely on this inapplicable term when describing the role of private contractors, even if those clearly do not fall under the definition of mercenaries. Headlines denouncing the reliance on mercenaries and catchy reports about guns for hire crying havoc around the world simply promise more readership. This will not be changed by legal scholarship, although it remains important to regularly highlight the differences between mercenaries and PMSC.

2) Interplay of Regulatory Efforts

Sossai argues that codes of conduct such as the International Code of Conduct for Private Security Service Providers (ICoC) should only take a complementary function. He therefore suggests incorporating the ICoC into all contracts with PMSC. This would be one way to ensure complementarity, but it comes with a caveat. Membership in the ICoC Association (ICoCA) requires companies to be certified to industry standards, such as the PSC.1 or ISO 18788 standard. For smaller companies, the costs of certification can be prohibitive. Should membership in ICoCA be incorporated into all contracts between PMSC and clients, the current consolidation trend within the industry could be further accelerated.

This is not to argue that certification and adherence to industry standards is negative. On the contrary. Inclusion of the ICoC into government procurement standards and contracts with NGOs, international organizations or multinational corporations can significantly improve human rights and international humanitarian law (IHL) compliance.

But only including the ICoC into all contracts without setting up comprehensive monitoring and oversight mechanisms is of little use. Companies could see membership in the ICoC as sufficient to relieve them of further compliance obligations. Legal scholarship should therefore assess different options for oversight and monitoring mechanisms, not only through ICoCA, but also through the home states of the PMSC, meaning the place where the PMSC is registered, as part of their due diligence obligations.

3) Direct Participation in Hostilities by Private Contractors

Sossai is right in arguing that states should refrain from entrusting PMSC with tasks which amount to direct participation in hostilities (DPH). If states wish to uphold the fundamental principles of IHL in good faith, they should refrain from contracting functions which fall under the notion of DPH to private contractors. Otherwise, they risk the integrity of the principle of distinction and endanger not only the contractors, but also other civilians in conflict zones. Some states have policies which limit outsourcing of functions to those not considered “inherently governmental”. There is however neither consensus on which functions fall under this category nor do the states completely adhere to their own policies on this issue. Legal scholarship should therefore monitor which functions are outsourced and remind states in case contractors engage in DPH and the outsourcing thus violates the principle of distinction.

4) Closing Accountability Gaps

Debates about the impunity of contractors and existing accountability gaps have surrounded the industry since its

rapid expansion during the wars in Afghanistan and Iraq. Yet, private contractors are by no means operating in a legal vacuum. There is regulation on an international level and a national level as well as self-regulatory initiatives which apply to the conduct of PMSC. There is however one significant challenge: establishing jurisdiction.

Immunity agreements are a key reason why contractors that violated human rights in states such as Iraq were not prosecuted. Moreover, home states of PMSC often lack the extraterritorial jurisdiction to enforce their national laws upon corporations operating overseas.

Identifying solutions to avoid those gaps in jurisdiction is important. At the same time, states also need to avoid regulatory overreach and a universalist application of national norms on other sovereign states and companies operating abroad. Countries such as Switzerland have taken first steps to ensure that PMSC registered within Switzerland comply with Swiss human rights obligations when operating overseas. These regulations are however only effective, if those whose rights were violated have access to a forum to issue their complaints and access to remedy.

5) Emergence of New Actors

Lastly, new trends of warfare as well as new actors in the PMSC industry continuously call for a reassessment of existing regulations. One focus should be on the new functions which PMSC provide. The operation of drones and programming of weapons systems poses unique legal challenges, vastly different from the provision of site security. Those new roles are not the only change currently

ongoing. Legal scholarship has grown used to analyzing the legal ramifications of outsourcing to British, American or maybe South African PMSC. But what if Chinese state-owned enterprises rely on Chinese PMSC with inevitable ties to the Chinese state for the provision of security in complex environments? Does this alter the existing rationale?

Quo Vadis PMSC?

The previously established five key challenges are important to bear in mind when advancing legal scholarship on PMSC. They have been studied thoroughly, but we are still far from having answers to the most crucial questions. Given the plethora of failed or failing states, there is no shortage of complex environments which require PMSC to ensure the security of government employees, IGO as well as NGO workers and company staff operating in those areas. Legal scholarship should consider the complexity of the industry and emerging trends when identifying new areas of research.

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